this case, simply a pretext for the City's desire to regulate unpopular speech, making this an inappropriate case to consider whether quantitative standards frustrate or actually further such regulations' purposes.[8]

More fundamentally, the stipulated fact that the City did not consider the issue of secondary effects in enacting the Ordinance explains why the City could not provide legitimate or consistent guidance regarding its proper interpretation or application. Given that the City failed to consider or articulate a constitutional purpose for the legislation, it is not surprising that the agencies charged to enforce it were unable to provide any form of guidance, formal or informal, regarding how it might be applied or interpreted in a way that is rationally related to a constitutional end. Even at this late date, the City's best attempt to articulate a meaning for the Ordinance consistent with its purpose devolves into argument about whether any more than a trivial amount of stock or trade of objectionable content may be tolerated.

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[8] Resolution of this issue should await a case in which there is some evidence regarding the impact of differing inventory mixes on secondary effects. That is because in setting a standard the City cannot arbitrarily adopt a standard. Instead, any standard must be linked to secondary effects in that it must be set no higher than the level the City reasonably believes necessary to ameliorate secondary effects. Therefore, consideration of whether a percentage standard frustrates or furthers efforts to ameliorate secondary effects cannot be considered in the absence of evidence on that point. In the absence of such evidence, the City's concerns about a percentage standard are hypothesized at best and disingenuous at worst.

III. The Tennessee Supreme Court's Decision Will Have Little Impact Outside of Knoxville, Tennessee.

The City argues that the Tennessee Supreme Court's opinion threatens the viability of more than 275 municipal ordinances that adopted the "substantial or significant" formulation after this Court rejected vagueness challenges to a Detroit ordinance that employed that very language. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). While this Court rejected, on standing grounds, the vagueness issues raised in *Young*, those challenges were mounted by operators of two "adult motion picture theaters," so the "substantial or significant" language was not before the Court in *Young*. *Id.* at 55 & 58-61.

More importantly, the Tennessee Supreme Court's opinion in this case was grounded in, and will be limited by, the unique facts of the case. As the discussion above recounts, the Tennessee Supreme Court's decision was driven by the fact that the City of Knoxville repeatedly refused to provide any guidance on the contours of the Ordinance to Entertainment Resources, the Knoxville police officers who were charged with enforcing the Ordinance, or even to the court. Pet. App. 11a-15a. The Tennessee Supreme Court was particularly perplexed by the City's reluctance to provide any guidance, since the City's position on the Gemstone Video stores made clear the City had some idea of where the dividing line must lie (or perhaps simply had an idea about which businesses it wanted in the City and which businesses it did not). Pet. App. 15a.[9] Despite its holding that the Ordinance was

[9] Chief Justice Drowota, who concurred in the results because he determined that the Ordinance was vague as applied to Entertainment

(Continued on following page)

vague on its face, the majority opinion acknowledged the possibility that the Ordinance was subject to a narrowing construction that would save it. Pet. App. 14a. The majority opinion, however, stated that in the absence of "any hint from the City," it was "at a loss" as to how to impart meaning without rewriting the Ordinance. Pet. App. 14a. Under those unique circumstances, it had no choice but to strike down the Ordinance.

The Tennessee Supreme Court's frustrations (shared in both the majority and concurring opinions) with the City's failure to provide any guidance in the face of repeated requests provide a roadmap for municipalities seeking to avoid the same fate as the City of Knoxville. If municipalities insist on holding onto the "substantial or significant" language, they can avoid the City's problems by providing guidance on the meaning of those terms to (1) those charged with enforcing the regulation, (2) those potentially subject to regulation by it, and (3) courts called upon to adjudicate disputes arising under the regulation. For that reason, the Tennessee Supreme Court's opinion is unlikely to have the far-reaching impact the City predicts, so the opinion does not warrant review by this Court.

Resources, also took the City to task for failing to provide any such guidance. Pet. App. 18a-19a.

CONCLUSION

For the foregoing reasons, the City's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PHILIP N. ELBERT, ESQ.
Counsel of Record
NEAL & HARWELL, PLC
2000 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219
(615) 244-1713

Counsel for Entertainment Resources, LLC

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In the Supreme Court of the United States

City of Knoxville,

Petitioner,

v.

Entertainment Resources, LLC,
d/b/a Fantasy Video,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITIONER'S REPLY BRIEF

Scott D. Bergthold
Counsel of Record
Law Office of
Scott D. Bergthold, P.L.L.C.
8052 Standifer Gap Road
Suite C
Chattanooga, TN 37421
(423) 899-3025
(423) 899-3029 fax

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Becker Gallagher Legal Publishing, Inc. 800.890.5001

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ARGUMENT IN REPLY

Respondent's brief in opposition to the petition is tellingly silent on the most basic reason for granting certiorari in this case: a significant split of authority over a recurring question of constitutional law requiring this Court's resolution. This reason for granting the writ, addressed at pages 9-12 of the petition, with additional citations to conflicting appellate decision at pages 14-16 thereof, goes unanswered by respondent. Instead, the brief in opposition makes an irrelevant jurisdictional argument and then contends that the Tennessee Supreme Court was correct in striking the phrase "substantial or significant portion of its stock in trade" as unconstitutionally vague on its face. The problem, however, is that numerous courts have reached the opposite conclusion in this same context, warranting the Court's intervention to settle this question that affects hundreds of municipalities around the country.

I. Because Due Process Protections Under the United States and Tennessee Constitutions Are Identical, This Court Has Jurisdiction Under *Michigan v. Long*.

Respondent's argument that the Tennessee Supreme Court held the ordinance to be unconstitutional under the state, as well as the federal, constitution merely restates that which is obvious from the decision below. Pet. App. 17a. This observation, however, does not call into question the jurisdiction of this Court because the Tennessee Supreme Court made it clear that "Article I, section 8 of the Tennessee Constitution provides an identical protection" as that provided by the Due Process Clause of the Fourteenth Amendment. Pet. App. 8a. Moreover, the Tennessee Supreme Court's decision herein, as well as its earlier cases cited in that decision, rely extensively on federal law. Pet. App. 8a-9a

(citing this Court's vagueness standards from *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Kolender v. Lawson*, 461 U.S. 352 (1983), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *Smith v. Goguen*, 415 U.S. 566 (1974)). Thus, there is no basis for concluding that the lower court decision rests on separate and independent state law grounds. Rather, the "the non-federal ground is so interwoven with the [federal ground]" that this Court's "jurisdiction is plain." *Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (quoting *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917)).

II. Respondent Acknowledges that the Decision Below Requires Mathematical Precision in Contravention of Established Vagueness Doctrine.

Respondent's merits argument ignores the crux of the City's petition – the split of appellate authority on the question *sub judice* – and instead argues that this case is on the correct side of the split. But even this contention runs headlong into controlling precedent from this Court.

Respondent concludes that "it appears the only way to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), is to establish a percentage standard." Brf. in Opp. 7.[1] Respondent thus correctly observes that the Tennessee Supreme Court's decision requires what neither this Court's precedents nor the on-point appellate authorities require: the mathematical precision of a specific percentage.

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[1] Respondent's brief then undertakes a discussion of the secondary effects doctrine that is irrelevant to whether the ordinance is unconstitutionally vague – the only question presented for review.

To survive a vagueness challenge, enactments need not provide "meticulous specifics" or mathematical precision; they are permitted "flexibility and reasonable breadth." *Grayned*, 408 U.S. at 110; *see also, e.g., Z.J. Gifts D-2, L.L.C.* v. *City of Aurora*, 93 P.3d 633, 639 (Colo. Ct. App. 2004) ("Furthermore, courts have determined that the terms 'substantial' and 'significant' have recognized meanings in the English language, and their use in the definition of 'adult bookstore' does not render them vague merely because a percentage of business devoted to floor space, sales, or inventory is not specified'") (internal citations omitted). Celestial precision is not constitutionally required, and uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 705 (2000).

Here, the Tennessee Supreme Court held that the term "substantial or significant" is unconstitutionally vague on its face because it does not specify an exact percentage of inventory that will successfully circumvent the ordinance. Pet. App. 14a. That decision is plainly contrary to this Court's vagueness doctrine – which holds that mathematical precision is not required – and should be reversed.

III. The Tennessee Supreme Court Invalidated "Substantial or Significant Portion of Its Stock in Trade" as Unconstitutionally Vague On Its Face, and the Facts of This Case Do Not Limit the Impact of That Determination.

Respondent's concluding argument cannot be squared with the decision it seeks to insulate from review. Conceding that hundreds of cities nationwide employ the language at issue herein, respondent makes the unpersuasive claim that the

Tennessee Supreme Court's decision is "grounded in, and will be limited by, the unique facts of the case." Brf. in Opp. 11.

The problem with this argument, of course, is that the Tennessee Supreme Court invalidated the Knoxville ordinance *on its face*. Indeed, the majority refused to adopt the narrower concurrence of their Chief Justice, who found the ordinance to be unconstitutional only as applied to Entertainment Resources based on the facts particular to the Fantasy Video store. Pet. App. 18a. Thus, the majority opinion is in conflict with both state and federal appellate opinions – including one from the Circuit in which Tennessee sits – that have rejected facial challenges to the same language. *See, e.g., Z.J. Gifts D-2, supra*; *City of Chicago v. Scandia Books*, 102 Ill. App. 3d 292, 430 N.E.2d 14, 18, 58 Ill. Dec. 72 (Ill. Ct. App. 1981); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1419 (8th Cir. 1994); *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986).

Respondent simply ignores these conflicting authorities that demonstrate the need for this Court to resolve the question presented.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the City respectfully requests that the Court grant the Petition.

November 4, 2005

Respectfully submitted,

Scott D. Bergthold
(Counsel of Record)
Law Office of
Scott D. Bergthold, P.L.L.C.
8052 Standifer Gap Rd., Ste. C
Chattanooga, TN 37421
(423) 899-3025
(423) 899-3029 Fax